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Supreme Court, U.S.
FILED
JUL 18 1991
OFFICE OF THE CLERK

No. 90-1947

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

JOHN K. YEE, et al.,
Petitioners,
vs.
THE CITY OF ESCONDIDO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the state court was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance did not constitute a federal taking even though it restricts a park owner's ability to increase space rent whenever a mobilehome is transferred from one homeowner to another.

2. Whether the state court was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance is not a violation of federal substantive due process even though it restricts a park owner's ability to increase space rent whenever a mobilehome is transferred from one homeowner to another.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, John K. Yee and Irene S. Yee, H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler dba Moonglow Mobile Home Park, Casa De Amigos Mobile Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates and Mildred D. Tacey* and Respondent, City of Escondido.

*As discussed *infra* at 7-8 n.6, the parties to the proceedings below also included Escondido Mobileparks West, Robert Dolley, et al., Glen Charles DeJong, et al., and Del Dios Mobile Home Estates.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH APPELLATE DISTRICT, DIVISION ONE, COURT OF APPEAL FOR THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of Escondido ("City") respectfully requests that this Court deny Petitioners, John and Irene Yee, et al.'s ("Yee") Petition for Writ of Certiorari ("Petition") seeking review of the California Court of Appeal decision in this case. In the alternative, because the state court was so clearly correct in ruling that the Escondido Rent Protection Ordinance does not effect a federal taking nor violate federal substantive due process, the City respectfully suggests that the Supreme Court grant certiorari and summarily affirm the judgment below; thereby resolving a matter of significant legal interest.

OPINIONS BELOW

On March 30, 1989, the California state trial court (San Diego Superior Court, Case No. N42268) issued its Order granting the City's Motion to Strike Portions of Yee's Complaint, sustaining City's Demurrer and Dismissing Yee's Action. See, Order, Petition at C42-C45.

On October 31, 1990, the California Court of Appeal issued its opinion affirming the Judgment of Dismissal. The opinion is reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551; see also, Slip Opinion, Petition at A1-A40.

On January 24, 1991, the California Supreme Court (Case No. S018568) issued its one page ruling denying Yee's Petition for Review. See, Ruling, Petition at B41.

JURISDICTION

The Opinion of the California Court of Appeal, Fourth Appellate District, Division One, was entered October 31, 1990. On January 24, 1991 the California Supreme Court denied Yee's Petition for Review. On April 11, 1991, this Court (per J. O'Connor) entered an order extending the time for filing Yee's Petition until May 24, 1991.[1] On April 30, 1991, this Court (per J. O'Connor) entered an order further extending the time for filing Yee's Petition until June 23, 1991. Yee's Petition for Certiorari was

[1]Neither Yee's April 9, 1991 Application (Appendix to this Opposition at A7-A11) nor the April 11, 1991 Order (Appendix to this Opposition at A12) refer to parties other than Yee. Under the circumstances the extension if time was effective only as to Yee. See, R. Stein et al., *Supreme Court Practice* (BNA 6th Ed. 1986) 318. Therefore to the extent Yee's later filed Petition purports to also be on behalf of any other parties (e.g. H.N. and Frances Berger Foundation, etc.) it is untimely and should be dismissed pursuant to United States Supreme Court Rule 13.1 and 28 U.S.C. section 2101(c)).

docketed with the United States Supreme Court on June 21, 1991. The jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. Section 1257.[2]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.

The California Constitution, Article I, Sec. 19, provides in pertinent part:

> Private property may be taken or damaged for public use only when just compensation, . . . has first been paid to, or into court for, the owner.

The California Mobilehome Residency Law (Cal. Civ. Code, Section 798 et seq.) governs many aspects of the relationship between a mobilehome park owner and a mobilehome owner residing on a rented space in a mobilehome park. Civil Code, Section 798.55(a) contains legislative justification for the unique protections provided mobilehome owners. Protections include restrictions on terminating a space tenancy (e.g., Civil Code,

[2]Although Yee purported to invoke the Supreme Court's jurisdiction under 28 U.S.C. Section 1257 (federal question jurisdiction) (Petition at 4) at other places in his Petition Yee seems to be trying to cast doubt on whether the federal questions had really been properly presented to the state courts. See, e.g., Petition at 25-44. As explained *infra*, 9-10 at note 9, it is apparent that Yee is making this latter argument to avoid the res judicata/collateral estoppel effect of the state court's decision on its federal claims.

Sections 798.55(b), 798.56) and restrictions preventing a park owner from interfering with or preventing a homeowner from selling his home to a new purchaser as long as the prospective homeowner has the financial ability to pay the space rent and does not have a prior history indicating that he or she will not comply with the rules and regulations of the park. (E.g., Civil Code, Section 798.74).

[California Civil Code, Sections 798.55, 798.56, 798.56(a), and 798.74 are set forth in Appendix D to Yee's Petition at D46-65.]

The Escondido Municipal Code ("EMC"), Article V, Sections 29-101 through 29-108 codified Proposition K (the Escondido Mobilehome Rent Protection Ordinance), an initiative ordinance that established mobilehome rent protection for mobilehome parks located within its jurisdiction.

Under the Ordinance if a mobilehome park owner wants to increase his rent, he must first obtain approval from the Mobilehome Park Rental Review Board. EMC, Section 29-103. To do so the park owner must file an application with the City Community Development Department ("Department"). EMC, Section 29-104(a). Once a rent increase application is determined to be complete by the Department, notice of the application is mailed to the affected homeowners. EMC, Section 29-104(c). The homeowners then have a right to submit written material in response to the application. *Ibid.* Normally the Board must commence a hearing on a completed application within 60 days. EMC, Section 29-104(e). At the hearing, the park owner and the affected homeowners may offer any evidence that is relevant to the requested rent increase. EMC, Section 29-104(f). Following the hearing, the Board, applying various factors, "shall determine

such rent increase as it determines to be just, fair and reasonable." EMC, Section 29-104(g). The Board's determination is final and notice of its decision is mailed to the park owner and the affected homeowners. EMC, Section 29-104(i).

[Pertinent portions of EMC sections 29-103 and 29-104 are set forth in the Appendix to this Opposition at A1-A3.]

STATEMENT OF THE CASE

A. Background.

The City of Escondido is located in Northern San Diego County in the State of California. It has a substantial number of mobilehome parks and mobilehome owners located within its boundaries.[3]

On June 7, 1988, the voters of the City of Escondido, passed Proposition K,[4] an initiative ordinance which established mobilehome rent protection. [Ordinance] The Ordinance became effective July 7, 1988.

B. Procedural History.

1. The State Superior Court Ruling.

On December 1, 1988, prior to seeking any rent increase from the Rental Review Board, Yee, who allegedly

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[3]The October 19, 1990 report by the California Department of Housing and Community Development listed 30 mobilehome parks and 3700 mobilehome spaces in Escondido. The March 27, 1990 County of San Diego "County Wide Mobilehome Task Force Final Report" found that 80% of the mobilehome spaces in the County were occupied by "senior households" who are "generally small elderly families with fixed incomes." *Id.* at 5.

[4]The vote was "yes" [illegible]148 (58.68%), "no" 7,850 (41.32%). *San Diego Union*, June 9, 1988, p. A-4.

owns the Friendly Hills and Sunset Mobilehome Parks located in the City of Escondido, filed a Complaint in the San Diego Superior Court.

Relying on *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1986), *cert. denied,* 485 U.S. 5940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988), Yee alleged that the Ordinance constituted a "taking" of his property in violation of Article I, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments of the United States Constitution and a deprivation of civil rights under color of law in violation of 42 U.S.C. Sections 1981 and 1983 because it did not permit him to automatically raise rents whenever a mobilehome was sold on site.[5] The Complaint sought declaratory and injunctive relief and damages in the amount of $6,000,000 plus attorneys fees and costs.

The City responded by demurring and moving to strike portions of the Complaint. On March 31, 1989, the Honorable Don Martinson, Judge of the San Diego Superior Court granted the Motion to Strike, sustained the General Demurrer without leave to amend, and on its own motion dismissed the entire action. See, Order, Petition at C42-C45.

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[5]While not specifically alleged in his Complaint Yee argued at the Demurrer hearing and in later appellate briefs that the same provisions also violated federal substantive due process.

2. The State Court of Appeal Decision

On June 8, 1989, Yee filed a Notice of Appeal with the state Court of Appeal.[6]

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[6]Despite the trial court's ruling that the above allegations did not state a cause of action, during the period May 12, 1989 to June 16, 1989, eleven (11) additional suits were filed by other mobilehome park owners challenging the Ordinance and seeking a sum total of over $40,000,000 in damages from the City.

[While some of these Complaints purported to rely only upon Article I, Section 19 of the California Constitution, during the Demurrer hearings or on appeal all park owners also raised federal taking and substantive due process challenges.]

By late September 1989 each of the cases had been dismissed by the San Diego Superior Court and all cases had been appealed to the state Court of Appeal. (*Del Dios Mobilehome Estates v. City of Escondido,* San Diego Superior Court No. N43698, *on appeal,* 4th Dist. Div. One No. D011030; *Richard C. Kuebler dba Moonglow Mobile Home Park v. City of Escondido,* San Diego Superior Court No. N43740, *on appeal,* 4th Dist. Div. One No. D010942; *Mountain Shadows Mobile Home Estates v. City of Escondido,* San Diego Superior Court No. D43830, *on appeal,* 4th Dist. Div. One D010805; *Casa De Amigos Mobile Home Estates v. City of Escondido,* San Diego Superior Court No. N43847, *on appeal,* 4th Dist Div. One No. D010972; *Vista Verde v. City of Escondido,* San Diego Superior Court No. N43873, *on appeal,* 4th Dist. Div. One No. D011011; *H.N. and Frances Berger Foundation v. City of Escondido,* San Diego Superior Court No. N43874, *on appeal,* 4th Dist. Div. One No. D010769; *Robert Dolley et al., v. City of Escondido,* San Diego Superior Court No. N43924, *on appeal,* 4th Dist. Div. One No. D011028; *Escondido Mobile Park West v. City of Escondido,* San Diego Superior Court No. N43925, *on appeal,* 4th Dist. Div. One No. D011027; *Imperial Escondido Mobile Estates v. City of Escondido,* San Diego Superior Court No. N43926, *on appeal,* 4th Dist. Div. One No. D011026; *Glen Charles DeJong et al., v. City of Escondido,* San Diego Superior Court No. N43927, *on appeal,* 4th Dist. Div. One No. D011029; *Tacey v. City of Escondido,* San Diego Superior Court No. N44050, *on appeal,* 4th Dist. Div. One No. D011115.)

On October 31, 1990, in a decision reported as *Yee v. City of Escondido,* 224 Cal.App.3d 1349, 174 Cal.Rptr. 551 (1990) (see also, Slip Opinion, Petition at A1-A40), the Court of Appeal Affirmed. It began by indicating that it was "revisit[ing] an issue of federal constitutional law we first considered several years ago in Oceanside . . . ." *Yee,* 224 Cal.App.3d at 1354. The Court then pointed out that:

> "[p]laintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking." The fact that used mobilehomes in Escondido are selling for more than they have in the past is irrelevant."

224 Cal.App.3d at 1354.

The Court examined Hall and its legal underpinnings and concluded that *Hall* was "an interpretative misstep" (224 Cal.App.3d at 1351n.1),[7] had misapplied *Loretto v. Teleprompter Manhatten CATV Corp.,* 458 U.S. 419, 102 S.Ct. 3165, 73 L.Ed.2d 868 (1982), and was inconsistent with subsequent decisions of the United States Supreme Court including *FCC v. Florida Power Corp.,* 480 U.S.

On May 21, 1990, pursuant to stipulation of the parties, all cases were consolidated for purposes of appeal and decision by the Court of Appeal. The parties further agreed that all cases would be submitted for decision by the Court of Appeal on the Briefs and oral argument in the *Yee* case. See Stipulation and Order, as set forth in the Appendix to this Opposition at A4-A6.

[7]*Yee* also concluded that *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347 (3rd Cir. 1990), "suffers from a similar defect." 224 Cal.App.3d at 1356n.6.

245, 107 S.Ct. 1107, 94 L.Ed.2d 282 (1987). *Yee,* 224 Cal.App.3d at 1354-1358.

3. The State Supreme Court Ruling.

On December 3, 1990, a Petition for Review was filed by Yee on behalf of himself and all other parties[8] seeking review from the California Supreme Court.

On January 24, 1991, the California Supreme Court denied Yee's Petition for Review. See, 1991 Cal. LEXIS 353; see also, Ruling Slip Op., Petition at B41.[9]

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[8]On or about January 9, 1991, counsel for Yee filed notice of withdrawal of Del Dios Mobilehome Estates from that Petition.

[9]On February 14, 1989, Yee filed a Complaint in the United States District Court for the Southern District of California. *Yee v. City of Escondido,* S.D. Cal. No. 89-0234-B (CM). In its federal suit, Yee raised essentially the same claims it had raised in the state suit contending that the City's Ordinance was both a public and private "taking" and violative of substantive due process under the Fifth and Fourteenth Amendments and 42 U.S.C. Section 1983 and Section 1985. The City responded with a motion to dismiss under F.R.C.P. Rules 12(b)(1) and (6) for lack of jurisdiction and for failure to state a claim primarily arguing that the federal suit was barred by res judicata/collateral estoppel based on the state court rulings on the same claims.

After initially staying the federal action, pending the plaintiffs' exhaustion of its state court remedies (see Order, Petition at E66-E68), on June 4, 1991 the Honorable Rudi Brewster, United States District Judge, issued a Judgment of Dismissal. See Order Granting Motion to Dismiss, Petition at G72-G78. Judge Brewster found that Yee's federal constitutional issues had been fully litigated and that the state court ruling was a valid, final judgment on the merits. *Id.* at G75. After noting that federal district courts are courts of original not appellate jurisdiction, the Court concluded that the proper forum for review of the state court judgment was the United States Supreme Court not the United States District Court, citing *Rooker v. Feldman* 263 U.S. 413, 415-416, 44 S.Ct. 149, 68 L.Ed.2d 362 (1923)

WHY THIS WRIT SHOULD BE DENIED OR IF GRANTED WHY THE JUDGMENT BELOW SHOULD BE AFFIRMED

I. THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED *YEE'S* TAKING CLAIM

Yee apparently bases its argument for granting this Writ of Certiorari on United States Supreme Court Rule 10(b) contending that the *Yee* state court decision conflicts with two federal appellate court decisions, *Hall, supra,* and *Pinewood, supra.* In fact, the Court below fully considered both decisions and found them distinguishable and against the weight of authority as set forth in subsequent federal and state court rulings.

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and *District Court of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 484-485, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Order, Petition at G76. [On June 21, 1991, the same day Yee filed its Petition, Yee also filed a Notice of Appeal to the Ninth Circuit from the June 4, 1991 Order.]

Much of Yee's effort in this Petition (e.g., "Questions Presented," Nos. 3 and 4 (Petition ii); "Argument", "The federal claim did not even exist at the time the state court purported to dispose of it" (Petition 25-44); and "Conclusion", "to remand to the owner court with instructions to limit its decision to state constitutional issues . . . [or] order the federal courts to take jurisdiction of Petition claims." (Petition 49)) is apparently designed to circumvent the federal district court res judicata ruling. In this regard, it should be noted that before receiving what it now considers an adverse ruling from the state courts, Yee made no attempt to reserve its federal claims from state court adjudication.

A. The *Hall* Rationale Has Been Undermined By Subsequent Cases.

1. The *Hall* Ninth Circuit Panel Decision.

In August 1984, the City of Santa Barbara enacted a mobilehome rent control ordinance. One of the key provisions required "mobile park operators to offer their tenants leases of unlimited duration." 833 F.2d at 1273. The Halls filed suit in federal district court claiming that by giving the tenants such a "perpetual lease" at a below market rental rate, the ordinance transferred to the tenants a possessory interest in the Halls' land. They alleged the prices of the mobilehomes increased after enactment of the ordinance and that this increase reflected a "taking" from the park owner. 833 F.2d at 1274. After reviewing those allegations, the District Court granted the City's Motion to Dismiss. *Ibid.*

On appeal, a Ninth Circuit panel reversed. After discussing both "regulatory taking cases" (e.g., *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), *reh. den.,* 439 U.S. 883, 99 S.Ct. 226, 58 L.Ed.2d 198 (1978), and "physical occupation cases" (e.g., *Loretto,* supra, the panel concluded "when viewed in the light most favorable to the Halls" the allegations seemed to present a claim for taking by physical occupation. 833 F.2d at 1276. Pointing out that the ordinance directed the landlord to give the tenant an indefinite lease, the panel concluded "[t]he right to occupy property in perpetuity is surely the type of property that is protected by the taking clause." *Ibid.*

After pointing out that the Santa Barbara Ordinance had apparently been enacted solely to alleviate "a critical shortage of low and moderate housing," the panel also indicated that it had significant doubts that the Ordi-

nance was rationally related to that end. 833 F.2d at 1280-81.[10]

[It is unfortunate that at the time the *Hall* panel made its decision it was apparently unaware of the discussion of similar claims in *Oceanside Mobilehome Park Owner's Ass'n. v. City of Oceanside,* 157 Cal.App.3d 887, 906-907, 204 Cal.Rptr. 239 (1984). There the Court specifically dismissed the argument that the combined effect of California Mobilehome Residency Law (Civil Code section 798 et seq.) and the local ordinance constituted a taking merely because "a selling tenant with a favorable rent controlled lease may be able to sell the onsite mobilehome for a higher price than can be obtained for the identical mobilehome situated in an unregulated park." 157 Cal.App.3d at 906-907. Had the Ninth Circuit been aware that *Oceanside* had previously considered and decided the same claim, it may have ruled quite differently.][11]

2. The Dissent From Denial Of Rehearing.

The *Hall* panel denied a petition for rehearing. 833 F.2d at 1281. A suggestion for rehearing en banc was also rejected, with three Circuit Judges dissenting. *Ibid.* The three dissenters correctly treated the rent control ordi-

[10]The panel also indicated their feelings toward rent control in general by questioning its overall rationality. See, 833 F.2d at 1281n.26.

[11]For example, the *Hall* panel described the Halls' claim as being "novel." 833 F.2d at 1273. Later after examining several rent control cases, the panel stated: "In none of the cited cases has the landlord claimed that the tenant's right to possess the property at reduced rental rates was transferrable to others, that it had a market value, that it was in fact traded on the open market and that tenants were reaping a monetary windfall by selling this right to others." 833 F.2d at 1278.

nance as an economic regulation and pointed out that the ordinance was similar to three rent control cases that the Supreme Court had dismissed as lacking a substantial federal question[12] and concluded "*The panel decision is thus contrary to controlling authority.*" 833 F.2d at 1282 [emphasis added].

The three dissenters also pointed out that the panel's rationality argument was flawed and that, because a Court does not have the power to sit as a "superlegislature," legislation passes constitutional muster if the legislature could have concluded that its action would promote a legitimate state interest. 833 F.2d at 1284.[13]

The City of Santa Barbara's Petition for a Writ of Certiorari was denied. *City of Santa Barbara v. Hall,* 485 U.S. 940, 108 S.Ct. 1120, 99 L.Ed.2d 281 (1988).

3. *FCC* Undermined The *Hall* Rationale By Finding No Taking Where A Property Owner Had Voluntarily Entered Into A Lease Subject To Rent Regulation.

Subsequent to the Hall panel's decision, the Supreme Court decided *FCC, supra.* There, this Court dismissed a utility's argument that a federal statute which authorized the FCC to determine the rates which it could charge a

[12]See, *Fisher v. City of Berkeley,* 471 U.S. 1124, 105 S.Ct. 2653, 86 L.Ed.2d 270 (1985); *Nash v. City of Santa Monica,* 470 U.S. 1046, 105 S.Ct. 1740, 84 L.Ed.2d 807 (1985); *Fresh Pond Shopping Center v. Callahan,* 464 U.S. 875, 104 S.Ct. 218, 78 L.Ed.2d 215 (1983).

[13]The Dissenters also correctly predicted that the *Hall* panel decision "... is an authorization for broad, wholesale attacks upon rent control regulation. It casts a shadow upon all economic regulation. Our court must now sit idly by and watch taxpayer's money and court time being expended in litigation over the effects of this decision." 833 F.2d at 1284.

cable TV system for the use of its poles constituted a "taking." The Court pointed out that the statute did not require the utility to rent its poles but merely regulated the rents charged once it had decided to rent. 480 U.S. at 251. The Court noted that unlike *Loretto, supra,* the public utility landlords had *voluntarily* entered into the leases with cable company tenants stating:

> [I]t is the invitation, not the rent which makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government lease.

Id. at 252-253.

The Court after also reiterating that, "statutes regulating the economic relations of landlord and tenants are not *per se* takings," dismissed the contention that the rent regulation was a taking. *Ibid.*

4. *Pennell* Rejected *Hall's* Rationale And Upheld The Rationality Of A Rent Control Ordinance Which Considered Tenant Hardship.

In *Pennell v. City of San Jose,* 485 U.S. 1, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988), this Court in upholding San Jose's rent control ordinance, not only refused to declare rent control a "per se" taking[14] (see, 485 U.S. at 12n.6), but also rejected the landlord's due process argument that the only legitimate purpose of the statute was to prevent rent increases caused by housing shortages and that the objective of alleviating individual tenant hardship was not

[14]The Amici Briefs (available on LEXIS) urging such action relied in great part on the *Hall* panel dicta (see, e.g., 833 F.2d at 1281n.26) that rent control should be considered a "per se" taking.

a policy that the legislature was free to adopt in a rent control ordinance. 485 U.S. at 12.

The Court pointed out that "a legitimate and rational goal of rate regulation is the protection of consumer welfare", and the consideration of tenant hardship as a factor to be considered in determining rent increases "represents a rational attempt to accommodate the conflicting interests of adjudicating tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment." 485 U.S. at 13.

5. *Eamiello* And *Thompson* Rejected The *Hall* Rationale And Upheld The Rationality Of A Statute Designed To Protect The Economic Interest Of Mobilehome Owners In Selling Their Homes On Site.

Eamiello v. Liberty Mobile Home Sales, 208 Conn. 620, 546 A.2d 805 (1988), *app. dism.,* 489 U.S. 1002, 109 S.Ct. 1104, 103 L.Ed.2d 169 (1989), also examined the *Hall* rationale and rejected its reasoning. There, the park owner, relying upon *Hall,* argued that a state statute which permitted a homeowner to sell his mobilehome on site was unconstitutional and constituted a "taking." 546 A.2d 815. The Connecticut Court after reviewing *Hall* declined to apply its rationale. 546 A.2d 816. It concluded that the statutory restrictions on the right of the park owner to control the term of the lease and the identity of the lessee was not sufficiently analogous to a physical occupation of the property to violate the federal "takings" clause. Second, it determined that there were significant differences between the Connecticut mobilehome statute[15]

[15]While Connecticut General Statute Section 21-79 is not a rent control statute, it does provide a form of "vacancy control." It

and the Santa Barbara Ordinance. *Ibid.* The Court after reviewing *Loretto, FCC,* and *Fresh Pond,* distinguished *Loretto,* pointing out that a mobilehome owner's right to occupy a mobilehome space was originally obtained "consensually" indicating that in entering into such a lease the park owner has transferred his "possessory interest" in the land to the homeowner in return for rents.[16] *Id.* at 818.

After noting that often, due to restrictive zoning, park owners have a "monopoly" (*Id.* at 819), the Court continued and pointed out mobilehome owners had a substantial investment in their homes[17] and allowing an on-site sale "serves a substantial public purpose in protecting the economic interests of mobilehome tenants in selling their homes on site." *Id.* at 819. After noting that there, the homeowner's home had been purchased for $12,500, and

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concludes with the following words: "No owner shall exact a commission or fee with respect to the price realized by the seller, unless he has acted as agent for the seller on a sale pursuant to a written contract, *or charge a rent for the mobile manufactured home space or lot upon which the purchased mobile manufactured home is located greater than the prevailing rate for any other space or lot located in the park.*" [emphasis added]

The first clause is similar to Cal. Civil Code Section 798.72 (Park owner cannot charge a *fee* to either a homeowner or prospective homeowner on change of ownership unless he performed a service). The second clause is similar to the Escondido Ordinance in that it puts limits on the right of park owners to raise *rents* upon transfer.

[16]The Court concluded that the restrictions put on the park owner's right to reject a transferee were quite similar to the common provision that a landlord may not unreasonably withhold his consent to the assignment of a lease by a tenant. See, 546 A.2d at 818.

[17]*Manheim,* "Tenant Eviction and the Taking Clause," 1989 Wisc.L.Rev. 925, 956n.179, notes that modern mobilehomes often cost between $30,000 and $75,000.

was worth $17,000 if sold on site but only $3,500 if it had to be moved, the Court concluded that the statute "protects tenants at mobilehome parks from being forced to sell to park owners at a substantial loss and as a consequence benefits many low income people who cannot otherwise afford to purchase a more expensive home." *Ibid.*

The Court recognized that the state statute which restricted rent increases on transfer might result in the homeowner receiving a greater price for his home because of the statutory right of the purchaser to continue occupancy of the site, but, nevertheless, upheld the statute concluding that because the state had created the site value through regulatory scarcity (e.g., zoning) it could constitutionally repose any sales premium in the homeowner rather than the park owner. *Id.* at 820.

The Court concluded:

> In choosing the tenant rather than the mobile home park operator as the recipient of this economic advantage arising form the near-monopoly status of the industry, the legislature, by allocating its benefit to those who generally are more in need, has not violated any constitutional principle. In our view, Section 21-79 strikes a reasonably fair balance between the economic interests of mobile home tenants and those of mobile home park operators.

Ibid.

In *Thompson v. Merlino Enterprises,* 208 Conn. 656, 545 A.2d 1094 (1988), *app. dism.,* 488 U.S. 1024, 109 S.Ct. 829, 102 L.Ed.2d 962 (1989), the Connecticut Court relying on *Eamiello, supra,* upheld the right of an administrator of an estate to sell a mobilehome on site recogniz-

ing that the home had a value of $11,000 if sold on site and almost no value if sold off site. See, 545 A.2d at 1097.

6. *Sperry* Indicates That A Mere Loss Of Money Is Not A Physical Taking.

More recently, in *United States v. Sperry Corp.*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), this Court held that a statute which required American claimants to pay the United States a percentage of the monetary rewards made by the Iran-United States Claims Tribunal was neither a "taking" nor a violation of the due process clause. In so doing, this Court, reversed the Court of Appeals which held that the payment was a "permanent physical occupation" of property and therefore a "per se taking" under *Loretto, supra,* stating:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the award rather than requiring Sperry to pay it separately. If the deduction in this case was a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of *Loretto.*

110 S.Ct. at 395n.9.

Here, as in *Sperry,* and unlike *Loretto,* there is no new physical property that is being occupied due to the ordinance. As in *Sperry,* the only difference is that without

the ordinance, the park owner might have been able to obtain more money or profit.[18]

Because *Sperry* holds that mere economic loss is not sufficient to constitute a "physical taking", one of the last underpinnings of the *Hall* panel's rationale has been undermined.

7. The Third Circuit's Decision In *Pinewood* Is Also Flawed Because It Failed To Consider Binding And Relevant Authorities.

In *Pinewood Estates of Michigan v. Barnegat Township Leveling Board, supra,* the park owner sued in federal court[19] alleging that the rent leveling ordinance of the Township of Barnegat, New Jersey took their property by

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[18]See, Note, "The Constitutionality of Rent Control Restrictions on Property Owner's Dominion Interests", 100 Harv. L. Rev. 1067, 1084n.106 (1987) (Note concludes there was no indication that the ordinance in *Hall* frustrated any interest of the plaintiffs other than the desire for greater profits). See also, *Manheim, supra,* 1989 Wisc.L.Rev. at 964-969 (Questioning the Hall panel's conclusion that a right to raise rents on transfer is a discrete property interest).

[19]It is unclear whether or not the federal court had proper jurisdiction over the case. The Complaint apparently alleged a "taking", therefore, it should have been brought in state court, assuming that New Jersey has adequate procedures for such inverse condemnation cases. See generally, *Williams County Regional Planning Comm'n. v. Hamilton Bank,* 473 U.S. 172, 196-197, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

See also, *Sinaloa Lake Owner's Ass'n. v. City of Simi Valley,* 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied,* ___ U.S. ___, 110 S.Ct. 1317, 108 L.Ed.2d 493 (1990), explaining that it was proper for *Hall* to be brought in the federal courts because it was originally filed at a time, prior to *First English [First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)], when California state courts would not award damages for ordinances which constituted a taking.

prohibiting them from increasing rents to a new mobilehome owner who bought the mobilehome, in place, from an existing resident. The District Court granted a Motion to Dismiss holding that the ordinance was a constitutional regulatory ordinance. 898 F.2d at 350.

On appeal, a Third Circuit panel reversed, holding that to the extent that the ordinance granted the homeowners a transferable possessory interest in the park owners land, it constituted a "physical taking" under *Loretto, supra. Id.* at 353-354.[20] After opining that "vacancy decontrol"[21] might solve the problem by permitting the park owner to raise rents to eliminate any "premium" (*Id.* at 353), the Court dismissed the argument that the park owners were being adequately compensated for their loss because the ordinance provided them with a "constitutionally adequate rent for the occupancy of the tenants as such." *Ibid.*

A careful analysis of *Pinewood* indicates that the Court apparently never considered a number of relevant decisions, e.g., *FCC, Pennell, Eamiello, Thompson, Sperry,* and *Oceanside, supra.*

Therefore, the *Pinewood* Court apparently never considered that, unlike *Loretto,* a mobilehome owner's right to occupy a mobilehome space is originally obtained "consensually" (*FCC, supra,* 480 U.S. at 252); that a park owner transfers his "possessory interest" in his land to

[20]The Court also noted that *Hall, supra,* had reached a similar conclusion. 898 F.2d at 353-354.

[21]Throughout its Petition Yee often refers to the restrictions on its right to raise rents on transfer as a "vacancy control" provision. Although some courts have also used this terminology, it is a misnomer because since mobilehomes are almost always sold "in place", there is rarely a space "vacancy."

the mobilehome owner in return for rents (*Eamiello, supra,* 546 A.2d at 818), and that since the state has created the site value through regulatory scarcity (e.g., zoning) it could constitutionally repose any sales premium in the homeowner rather than the park owner. *Eamiello, Id.* at 820.

They failed to consider that the only park owner's "property interest" frustrated by the ordinance was his desire for greater profits and that such an interest does not qualify for a physical taking. See, *Sperry, supra,* 110 S.Ct. at 395n.9.

The *Pinewood* panel's comments about the desirability of "vacancy decontrol" clearly indicated that they were unaware that "mobilehome owners are enclosed within a captive market" (*Oceanside, supra,* 157 Cal.App.3d at 910); that "park owners have a monopoly," (*Eamiello, supra,* 546 A.2d at 819) and that "taken collectively the [mobile] homeowners have a greater investment than does the [mobile] home park owner", *Oceanside, supra,* 157 Cal.App.3d at 911n.9. The Court, therefore apparently never considered the public interest in protecting the mobilehome owner's investment. See, *Eamiello, supra,* 546 A.2d at 819.[22]

[22]By requiring that space rent not be arbitrarily increased upon the sale of a home or occurrence of a space vacancy, the Escondido Ordinance adds certainty to the mobilehome market, prevents abusive rents which result in a destruction of the equity that a homeowner has in his or her home, stabilizes rents among spaces in a park, and assures continuation of mobilehome living as a legitimate housing option.

The grim reality of what happens when arbitrary increases are made on transfer is only recently becoming public. On remand from the Ninth Circuit decision, the Halls were able to convince the trial court that there was a rent control sales premium and received a

8. Recent Decisions Show That Even The Ninth Circuit Is Struggling With The *Hall* Rationale.

In *DeAnza Properties X Ltd. v. County of Santa Cruz,* ____ F.2d ____, 1991 9th Cir. Slip Op. 7983, 1991 U.S. App. Lexis 13254 (9th Cir. No. 89-15750, June 28, 1991), the plaintiff mobilehome park owners (DeAnza) brought federal taking and due process challenges to vacancy control provisions of the County's mobilehome rent control ordinance. 1991 9th Cir. Slip Op. at 7986. The District Court dismissed on statute of limitations grounds because the challenged provision had been enacted in

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substantial damage award. Prior to appeal to the Ninth Circuit, the case settled when the City of Santa Barbara agreed to lift all restrictions on rent increases at the time of transfer. Almost immediately, Mrs. Hall informed certain park residents that she was going to raise rent on any transfer by $250 to $300 per month. As a result, homes which a few months before had been purchased for $80,000 became virtually unsalable.

For example, Mrs. Hall's attorney, Mr. Jagiello, has publicly stated: ". . . in the Hall park over the last two years, not one coach has sold, although many are for sale, but for the exception of a coach that sold two weeks ago for one dollar. There were attempts to give coaches away to charities and they wouldn't take them. There is no market for coaches in Santa Barbara." See, Administrative Record to *Palomar Estates East v. City of San Marcos,* San Diego Superior Court No. N48882, April 9, 1990 Hearing Transcript at 7.

It is clear that in the absence of vacancy control certain unscrupulous park owners will take much more than the so called "rent control premium" they will take "all the market can bear," that is all the homeowner's equity. Thus, a homeowner who in good faith invested in a home, recognizing the reality that the home could not be moved, under the *Hall* theory is faced with the prospect of losing the value of his or her investment or remaining a captive in the mobilehome park.

Unless homeowners and their lenders are assured that the value of a home will remain relatively stable, the mobilehome market will evaporate, investments will be lost, and a legitimate affordable housing option will be lost.

1982 more than five years before DeAnza filed the suit. *Ibid.*

On appeal, the Ninth Circuit affirmed, ruling that under *Hall,* a cause of action accrues when the County enacts the ordinance (*Id.* at 7987-7988) and that subsequent amendments do not start the period running again as long as the challenged provision remains the same. *Ibid.* The Court also dismissed the argument that a new cause of action accrues each time a resident sells his mobilehome. *Id.* at 7989-7990.

In *Sierra Lake Reserve v. City of Rocklin,* ____ F.2d ____, 1991 9th Cir. Slip Op. 8463, 1991 U.S. App. LEXIS 14119 (9th Cir. 89-15731, July 9, 1991, a different panel reversed a district court which had dismissed a *Hall* taking challenge on ripeness grounds. The panel indicated that in light of the consistent California decisions which had rejected *Hall* taking claims, it was no longer necessary to abide by *Williamson County* state court exhaustion requirements. 1991 9th Slip Op. at 8471. A concurring Circuit Judge while indicating that he felt bound by the *stare decisis* effect of *Hall* noted that *Hall* had reached a "commendable *legislative result* by calling a regulatory ordinance a physical taking" [emphasis added.] *Id.* at 8479.[23]

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[23]In addition to the above cases, a LEXIS search disclosed two additional unpublished Memorandum Decisions in which the Ninth Circuit distinguished or limited *Hall.* See, *Page v. City of Rialto,* 1991 U.S. App. LEXIS 1272 (Memorandum, 9th Cir. Nos. 88-6588, 88-6638, filed January 25, 1991) (Court affirmed dismissal of challenges to mobilehome rent control ordinance including *Hall* taking and substantive due process challenges, distinguishing the Rialto Ordinance from that involved in *Hall*); *Kuebler v. City of Escondido,* 1991 U.S. App. LEXIS 10,948 (Memorandum, 9th Cir. No. 90-55708, filed May 21, 1991) (Court affirmed dismissal of *Hall* substantive due process challenge to Mobilehome Rent Protection Ordinance on

B. Every California Court Which Has Considered The Issue Has Rejected The *Hall* Rationale.

In addition to *Oceanside* and *Yee, supra,* every other California appellate court which has directly considered the issue has rejected the *Hall* rationale.

For example in *Casella v. City of Morgan Hill,* 230 Cal.App.3d 43, 280 Cal.Rptr. 876 (1991), the Court rejected a challenge to the City of Morgan Hill's mobilehome rent control ordinance claiming that its lack of a "vacancy decontrol" provision which allows rents to be increased when a mobilehome is transferred was a "taking." In carefully analyzing the *Hall* decision (*Casella,* 230 Cal.App.3d at 49-57), the Court concluded:

> We find *Hall* distinguishable in a way we think the Supreme Court would find material. (833 F.2d at p. 278) Like the California appellate district which has considered the issue before us (see *Yee v. City of Escondido* (1990) 224 Cal.App.3d 1349), we repudiate *Hall*'s attempt to bootstrap a mobile home rent control ordinance — an economic regulation — to the Supreme Court's "very narrow" holding in *Loretto.*

Id. at 52.

The Court continued its analysis stating:

> As *Yee* and others have pointed out, the increase in the sales prices of mobile homes resulting from rent control may simply reflect the artificially low price caused by excessive rents charged prior to its enact-

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ripeness grounds because park owner had not exhausted administrative remedies under the Ordinance). Consistent with Ninth Circuit Rule 36-3, the above unpublished cases are not being referred to for precedential purposes but merely to inform this Court of the way other Ninth Circuit panels are struggling with the *Hall* rationale.

> ment. The mere fact that increased coach prices are a corollary to rent control does not establish that a taking has occurred . . . .

Id. at 54.

Finally, the Court rejected Hall's analysis of substantive due process by concluding:

> The stated purpose of the city's ordinance is to control excessive rental prices for the largely fixed-income residents of mobile home parks. This is unquestionably a legitimate state interest. The City of Morgan Hill could reasonably have concluded that the mobile home rent control ordinance would promote this goal. Whether as a means to achieve its stated purpose rent control is a good idea is a political decision — one which properly rests with the legislative branch of government. We agree with *Yee* that this is "not a question of constitutional law for the courts."

Id. at 57.[24]

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[24]Several California Courts of Appeal have also issued unpublished decision affirming dismissals of *Hall* taking challenges to mobilehome rent control ordinances. See, e.g., *Tubach v. City of San Marcos* (4th Civ. No. D011098, December 11, 1990), *rev. denied,* (Cal. Supreme Ct., No. S019270, February 27, 1991; *Palomar Mobilehome Park Ass'n. v. City of San Marcos,* (4th Civ. No. D011484 filed February 6, 1991), *review denied* (Cal. Supreme Ct. No. S019940, April 17, 1991), Pet. for Cert. docketed (United States Supreme Court No. 90-1824, May 28, 1991); *Peppard v. City of Carpinteria,* 226 Cal.App.3d 812, 278 Cal.Rptr. 100 (1991), *rev. den. and opinion ordered depublished,* 1991 Cal. LEXIS 1293 (Cal. Supreme Ct. No. S019552, filed March 21, 1991). Consistent with California Rules of Court, Rule 976, the above unpublished cases are not being referred to for precedential purposes but merely to inform this Court that other California courts have also rejected the *Hall* rationale.

C. In Any Event, The Escondido Ordinance Is Distinguishable From That Considered In *Hall*.

The Santa Barbara Ordinance discussed in *Hall* put various restrictions on a park owner's right to terminate a mobilehome owner's space lease and required mobilehome park owners to offer leases of unlimited duration. See *Hall*, *supra*, 833 F.2d at 1273.

There are no similar restrictions in the Escondido Ordinance.[25] To the extent that the homeowners are given the right to occupy and use the park that right is granted not by the Escondido Ordinance, but instead by state law. See, Mobilehome Residency Law, Cal. Civil Code, Sections 798.56, 798.74. This fact by itself is sufficient to distinguish *Hall*.

II

THE COURT BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THAT THE ORDINANCE ADVANCES A LEGITIMATE GOVERNMENTAL PURPOSE AND DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS

Yee also contended (Petition at 14-15) that the Ordinance violates substantive due process because its vacancy control provision does not advance a legitimate governmental purpose.

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[25]Yee's implications to the contrary (Petition at 8) are erroneous. The only Ordinance restrictions on termination are in EMC section 29-106 which apply only to a "tenancy which is not subject to the provisions of the Mobilehome Residency Law" (e.g., someone who rents a mobilehome from a homeowner). As to these persons, the termination provisions are virtually identical to those applied to homeowners in the Mobilehome Residency Law.

The Escondido Ordinance seeks to remedy an inequitable market situation caused by the scarcity of mobilehome spaces by protecting mobilehome owners from unreasonable space rental increases therefore protecting the homeowner's investments, while also providing park owners with a just and reasonable return on the park owner's investment.

The Courts have found rent control legislation to be a reasonable and legitimate means of addressing problems related to scarcity in rental property and the high rents resulting from inequities in bargaining power. See, e.g., *Pennell*, *supra*, 485 U.S. at 13-14 (Court upheld rent control ordinance which required consideration of hardship to low income tenants of rent increase); see also, *Schnuck v. City of Santa Monica*, ____ F.2d ____, 1991 9th Cir. Slip. Op. 6877, 6885, 1991 U.S. App. LEXIS 11113 (9th Cir. No. 89-55283, June 4, 1991) (Court held City had a legitimate interest in imposing eviction controls as part of rent control ordinance to "protect tenants from the high cost of dislocation in the tight housing market, and prevent landlords from arbitrarily evicting tenants simply to obtain higher rents from new tenants.").

In *Oceanside*, *supra*, the Court noted that "the ordinance recognizes not only the realities of a captive market, but also the proprietary interests mobilehome owners have individually and cumulatively in their homes and appurtenances." *Id.* at 910-911.[26]

In *Azul Pacifico v. City of Los Angeles*, 740 F.Supp. 772 (C.D. Cal. 1990), *on appeal*, 9th Cir. No. 90-55853, the

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[26]In an accompanying footnote, the Court noted that "the continuing possibility of unreasonable space rental increases in manufactured home parks threatens to diminish the value of the investment of the manufactured home owners." 157 Cal.App.3d at 911n.9.

District Court reached a similar conclusion. Although the Court considered itself bound by *Hall* to find a "taking" (*Id.* at 781), it nevertheless set forth its conclusion that a legitimate state interest justified the City's enactment of the Rent Stabilization Ordinance ("RSO") including the "vacancy control" provisions. *Id.* at 780. The Court noted:

> Based on testimony from mobile home tenants, the City found that, without vacancy control, it would be virtually impossible for tenants to sell their homes on the pad because landlords could raise the rents to a level that prospective buyers could not afford.

Ibid.

Pointing out that "the Supreme Court has long held that protection of consumer welfare is a legitimate and rational goal of price control" (*Ibid.*), and that rent control has long been held constitutional as "a legitimate exercise of the state's police power" (*Id.* at 781), the Court determined that "the mobile home market is an example of a monopoly, which is a market *failure*, rather than a market, and is a prime candidate for governmental regulation." *Ibid.*[27]

The Court below properly ruled that the Ordinance advances a legitimate purpose and is not a violation of substantive due process.

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[27]In its recent *Sierra Lake* decision, the Ninth Circuit also ruled that the enactment of a vacancy control ordinance did not violate substantive due process. *Sierra Lake, supra,* 1991 9th Cir. Slip Op. at 8477.

CONCLUSION

Yee's Petition is untimely filed as to all parties except the Yees themselves and therefore the Petition on behalf of the other parties should be dismissed.

To the extent that Yee's Petition seeks to raise issues never presented below, i.e., whether the federal claim did not exist at the time the state court ruled (see, Yee's Petition at 31-44), it should also be summarily denied. See, e.g., *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) (Traditionally the Court refuses to "decide federal constitutional issues raised here for the first time on review of state court decisions").

Respondent City also respectfully submits that the Court should deny Yee's Petition seeking review of the taking and due process decisions of the state court because it is clear that these decisions were properly made.

However, City recognizes that this case raises an important issue of "taking jurisprudence", i.e., whether a "taking" exists in the context of the regulation of space rent to new residents in a mobilehome park.[28] Therefore in the alternative, Respondent City respectfully suggests that if this Court decides that the petition presents an important issue justifying a grant of certiorari, review

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[28]Counsel for Respondent are aware that the issue of whether a mobilehome rent review ordinance which prevents or restricts rent increases on the sale of a mobilehome in place in a park is a "taking" is of major concern to many cities and other local governments, mobilehome park owners and mobilehome residents throughout California and perhaps the nation. For example, the League of California Cities has established a special subcommittee to address this and related issues. The need to resolve this issue in order to protect mobilehome living as a legitimate housing option should not be minimized.

should be limited to consideration of the taking issue. Finally, City respectfully suggests that a grant of certiorari and a decision summarily affirming the state court decision would remove the "shadow" caused by *Hall* (see *Hall, supra*, 833 F.2d at 1284) and prevent further wasteful litigation on this issue.[29]

Dated: July 18, 1991

Respectfully submitted,

DONALD R. LINCOLN
(Counsel of Record)
LINDA B. REICH
ENDEMAN, LINCOLN, TUREK & HEATER

DAVID R. CHAPMAN, City Attorney
JEFFREY EPP, Asst. City Attorney
CITY OF ESCONDIDO

Attorneys for Respondent
City of Escondido

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[29]Yee is the second petition filed with this Court raising the same issues. A Petition in *Palomar v. City of San Marcos*, United States Supreme Court Docket No. 90-1824 was filed on May 28, 1991. Several other cases in which *Hall* type challenges have been raised to local mobilehome rent review ordinances are currently at some stage of the state (e.g., *Casella, supra*) or federal (e.g., *Azul, supra*) appellate process and may ultimately reach this Court.

APPENDIX A

ARTICLE V. MOBILEHOME RENT CONTROL

Sec. 29-103. *Base rent.*

Except as hereinafter provided, an owner shall not demand, accept, or retain rent for a mobilehome space exceeding the rent in effect for said space on January 1, 1986.... No owner shall send a notice containing the specific amount of a proposed rental increase prior to receiving approval of a rent increase from the board.

Sec. 29-104. *Permitted rent increases based upon an application approved by the board.*

(a) An owner may file with the department a rent increase application for one or more mobilehome spaces for approval by the board.

...

(c) Upon receipt of a rent increase application, the department shall mail a notice to the affected tenants at the mobilehome spaces designated in the application, informing them of the receipt of such application, the amount of the requested rent increase, a brief summary of the owner's justification for the request, any supporting documents which may be inspected at the City Hall, the tenant's right to submit written statements, photographs or other documents relating to the application within thirty (30) days after the date the notice is mailed, and the address where such statements or documents may be mailed or delivered.

...

(e) A copy of each rent increase application shall be provided to each member of the board after such application is determined to be complete. The board shall hold a hearing on said application within sixty (60) days after such determination is made except as provided in subsec-

tion (i). Notice of the time, date, and place of the hearing shall be mailed to the applicant and the affected tenants at the mobilehome spaces designated in the application at least ten (10) days prior to the hearing.

(f) At the hearing, the applicant and the affected tenants may offer any testimony that is relevant to the requested rent increase. The applicant and affected tenants may offer documents, written declarations, or other written evidence for the first time at the hearing only if good cause is shown why such evidence was not filed with the department prior to the hearing. Formal rules of evidence shall not be applicable to such proceedings. [In most cases] . . . within fifteen (15) days after the close of the hearing, the board shall make its determination, pursuant to the standards established by subsection (g) of this section, approving or disapproving a rent increase for the mobilehome space or spaces specified in the rent increase application.

(g) The board shall approve such rent increase as it determines to be just, fair and reasonable. The board shall consider the following factors, in addition to any other factors it considers relevant, in making such determination:

(1) Changes in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area published by the Bureau of Labor Statistics.

(2) The rent lawfully charged for comparable mobilehome spaces in the City of Escondido.

(3) The length of time since either the last hearing and final determination by the board on a rent increase application or the last rent increase if no previous rent increase application has been made.

(4) The completion of any capital improvements or rehabilitation work related to the mobilehome space or spaces specified in the rent increase application, and the cost thereof, including such items of cost, including materials, labor, construction interest, permit fees, and other items as the board deems appropriate.

(5) Changes in property taxes or other taxes related to the subject mobilehome park.

(6) Changes in the rent paid by the applicant for the lease of the land on which the subject mobilehome park is located.

(7) Changes in the utility charges for the subject mobilehome park paid by the applicant and the extent, if any, of reimbursement from the tenants.

(8) Changes in reasonable operating and maintenance expenses.

(9) The need for repairs caused by circumstances other than ordinary wear and tear.

(10) The amount and quality of services provided by the applicant to the affected tenant.

(11) Any existing written lease lawfully entered into between the applicant and the affected tenant.

. . .

(i) Notice of the board's determination shall be mailed to the applicant and all affected tenants at the mobilehome spaces designated in the application. The determination of the board shall be final.

COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION ONE

JOHN K. YEE and IRENE S. YEE,
Appellants/plaintiffs,

vs.

CITY OF ESCONDIDO, etc., et al.,
Respondents/Defendants.

No. D010307

STIPULATION TO CONSOLIDATE APPEALS OF CASES PENDING BEFORE THIS COURT

LAW OFFICES OF
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Attorney for Plaintiffs,
John K. Yee and Irene S. Yee

TO: THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES, THE HONORABLE HOWARD WIENER, THE HONORABLE RICHARD D. HUFFMAN, AND THE HONORABLE DON R. WORK, COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE:

Currently pending before this Court is the above-captioned case, and the cases of *Mountain Shadows*

Mobilehome Estates v. City of Escondido, Appellate case No. D 010805, *Del Dios Mobilehome Estates v. City of Escondido,* No. D 011030, *Richard C. Kuebler dba Moonglow Mobilehome Park v. City of Escondido,* No. D 010942, *Casa de Amigos Mobilehome Estates v. City of Escondido,* No. D 010972, *Vista Verde Limited v. City of Escondido,* No. D 011011, *H.N. and Frances C. Berger Foundation v. City of Escondido,* No. D 010769 and *Mildred D. Tacey v. City of Escondido,* No. D 011115, all of these cases (with the exception of Yee) are currently consolidated in this Court under Case No. D 010769. The attorneys of record in these cases are Robert J. Jagiello & Associates, Robert J. Jagiello, for plaintiffs and appellants, and Endeman, Lincoln, Turek & Heater, Donald R. Lincoln, and the City Attorneys Office, David R. Chapman and Jeffrey Epp, for defendants and Respondents.

Also pending before this Court are the cases of *Escondido Mobileparks West v. City of Escondido,* Case No. D 011027, *Imperial Escondido Mobile Estates v. City of Escondido,* No. D 011026, *Glenn Charles Dejong v. City of Escondido,* No. D 011029 and *Robert Dolley v. City of Escondido,* No. D 011028. The attorneys of record for these four cases are Swanson & Dowdall, C. Brent Swanson, attorneys for plaintiffs and appellants, and Endeman, Lincoln, Turek & Heater, Donald R. Lincoln, and the City Attorneys Office, David R. Chapman and Jeffrey Epp, attorneys for defendants and respondents.

The parties to the above cases hereby agree, through their attorneys of record, that, as requested by Justices Weiner, Huffman, and Work on hearing oral argument in the case of *Yee v. City of Escondido,* on May 7, 1990, that all of the cases listed herein be consolidated for purposes of appeal and for rendering of a decision by this Court. The parties, through their attorneys of record, further

agree that these cases will be submitted for decision on the Briefs and oral argument in the *Yee* case.

IT IS SO STIPULATED.

Dated: May 11, 1990 ROBERT J. JAGIELLO
& ASSOCIATES

By /s/ Robert J. Jagiello
ROBERT J. JAGIELLO

Dated: May 16, 1990 SWANSON & DOWDALL

By /s/ C. Brent Swanson
C. BRENT SWANSON

Dated: May 14, 1990 ENDEMAN, LINCOLN,
TUREK & HEATER

By /s/ Donald R. Lincoln
DONALD R. LINCOLN

Dated: May 15, 1990 ESCONDIDO CITY
ATTORNEYS OFFICE

By /s/ Jeffrey Epp
JEFFREY EPP

IT IS SO ORDERED /s/ Kremer P.J.
KREMER P.J.

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN K. YEE and IRENE S. YEE,
Plaintiffs/Petitioners,
vs.
CITY OF ESCONDIDO, a Municipal corporation,
Defendants/Respondents.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court Rules 13.2 and 30)

(No Docket Number)

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(Robert J. Jagiello, 035986)
Attorney for Petitioners

TO: JUSTICE SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Title 28, United States Code, Section 2101(c) and Rule 13.2, Rules of the Supreme Court of the United States, application is hereby made for an extension of time within which to file a Petition for Writ of

Certiorari from April 24, 1991, to and including June 23, 1991.

1. The Order sought to be reviewed is that of the Supreme Court of the State of California in the case entitled *Yee v. City of Escondido,* SO 18568, reviewing the decision of the Fourth Appellate District, Division One, consolidated under Case No. D10307.

2. The denial of the Petition for Review was entered on January 24, 1991. The time allowed by law for filing the Petition for Writ of Certiorari will expire on April 24, 1991.

3. The denial of the Petition for Review, as well as the Opinion of the Court of Appeal, Fourth Appellate District, Division One, in the underlying case are appended hereto, marked as Exhibits "A" and "B" and by reference thereto, fully incorporated herein. The Appellate Court decision was reported at 224 Cal.App.3d 1349, 274 Cal.Rptr. 551 (1990) reviewed denied ____ Cal.3d ____ (1/24/91).

4. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257(3).

5. This case involves a claim by Petitioners that the rent control ordinance of the City of Escondido, as it applies to mobilehome parks, effects an unconstitutional taking of Petitioners' property. A taking was found to exist under precisely the same circumstances by the Ninth Circuit in the case of *Hall v. City of Santa Barbara,* 833 F.2d 1270 (9th Cir. 1987) *cert. den.,* 485 U.S. 940, 99 L.Ed.2d 1120, 1089 S.Ct. 1120 (1987), and the Third Circuit in the case of *Pinewood Estates of Michigan v. Barnegat Township Leveling Board,* 898 F.2d 347 (3rd Cir. 1990).

6. The Court of Appeal of the State of California for the State of California refused to follow the *Hall* and *Pinewood Estates* case, and instead, concluded that there was no taking under Article 1, Section 19 of the California Constitution, or under the Fifth Amendment. The decision of the California Court of Appeal is contrary to established federal appellate decisions cited immediately above.

7. This extension is requested for the following reasons:

(a) The original action was filed in State Court in order to comply with the requirements of *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108 (1985), wherein Petitioners must first resort to the State Courts in order to establish the Petitioners' claim is "ripe" for the adjudication by the Federal Court.

(b) The decision of the California Supreme Court and the California Court of Appeals establish that there is no state remedy in the State of California for precisely the kind of taking found to exist in both the *Hall* and *Pinewood* cases cited above.

(c) Petitioners then filed a motion to vacate the stay entered by the United States District Court, Southern District of California, in the case of *Yee v. City of Escondido,* Civil No. 89-0234-B. Said Stay was entered pursuant to a Motion for Abstention by the Respondent, City of Escondido, pending a resolution of the matter in the State Courts.

(d) On March 25, 1991, the United States District Court entered an Order Lifting Stay, and finding that the Petitioners have exhausted their State Court remedies as required by the *Williamson* case. (A copy of the

Order is appended hereto, marked Exhibit "C" and by reference thereto, fully incorporated herein).

(e) On or about March 22, 1991, Respondent, City of Escondido, filed a Motion for Reconsideration which is now set for hearing on April 29, 1991, a time that goes beyond that presently available for Petitioners to file their Petition for Writ of Certiorari in the Supreme Court of the United States.

(f) If the United States District Court reverses its decision lifting the Stay, the only available remedy will be by way of Petition for Writ of Certiorari before this Court.

(g) Critical federal constitutional rights arising under the Fifth Amendment are at issue in this litigation, the Courts of the State of California have refused to protect those constitutional rights despite the existence of compelling federal authority to the contrary, and Petitioners seek leave to extend the time within which to file the Petition for Writ of Certiorari as the last available avenue for a remedy in the event of reversal by the District Court of its Order Lifting Stay.

WHEREFORE, it is respectfully requested that the time within which a Petition for Writ of Certiorari herein be extended to and including June 23, 1991.

DATED: April 9, 1991

Respectfully submitted,

LAW OFFICES OF JAGIELLO
& PECH

By /s/ ROBERT J. JAGIELLO
ROBERT J. JAGIELLO
Attorneys for Petitioners

SUPREME COURT OF THE UNITED STATES

No. A-766

JOHN K. YEE AND IRENE S. YEE,
Petitioners,
vs.
CITY OF ESCONDIDO

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 24, 1991.

/s/ SANDRA DAY O'CONNOR
Associate Justice of the Supreme
Court of the United States

Dated this 11th
day of April, 1991.